(1) Supreme Court, U.S.
FILED

961662 APR 16 1997

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1996

MARVIN DANIELS,

Petitioner,

v.

KANSAS CITY SOUTHERN
RAILWAY COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

PETITION FOR A WRIT OF CERTIORARI

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57 pp

QUESTION PRESENTED

Under the Federal Employers' Liability Act, may an injured worker be held to be an "insurer" of his own safety and thereby be completely barred from recovery even though his negligence was not the sole cause of his injuries?

LIST OF PARTIES

The caption contains the names of all parties who appeared before the Missouri Court of Appeals and the Missouri Supreme Court.

LIST OF PARENT COMPANIES OR NONWHOLLY OWNED SUBSIDIARIES

There are no parent companies or nonwholly owned subsidiaries of Kansas City Southern Railway Company.

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OPINIONS BELOW

The opinion of the Missouri Court of Appeals, Western District, issued October 22, 1996, has not been reported. It is reproduced in the Appendix at A-1. The Missouri Supreme Court's Order denying Petitioner's Application to transfer, without opinion, is set out in the Appendix at A-7. The trial court's Order and Judgment sustaining the Defendant Kansas City Southern Railway Company's Motion for Judgment Notwithstanding the Verdict is set out in the Appendix at A-9.

JURISDICTION

The decision of the Missouri Supreme Court denying Petitioner's Application to transfer was entered on January 21, 1997. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a) and Sup. Ct. R. 10(b) and (c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The federal statutes involved in this appeal are 28 U.S.C. §§ 51, 53, and 55, which are set out in their entirety in the Appendix at A-21 to A-24. The most pertinent portion of 28 U.S.C. § 51 provides:

> Every common carrier by railroad . . . shall be liable in damages to any person

> suffering injury while he is employed by such carrier . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier[.]

STATEMENT OF THE CASE

This case arises out of a relatively simple factual situation, in which the Petitioner, Marvin Daniels, was injured while working as a railroad worker by the sudden, unexpected negligence of a co-worker (a trainee) who was operating a locomotive while Mr. Daniels was supervising and instructing that co-worker in the operation of the locomotive.

In the early evening of June 17, 1991, Petitioner Marvin Daniels was working as a locomotive engineer for Respondent Kansas City Southern Railway Company (hereinafter "KCS"). At that time, Mr. Daniels was a sixty-year-old locomotive engineer from Pittsburgh, Kansas, who had been working for KCS for over forty years. For the last fourteen years prior to June 17, 1991, Petitioner had been working for KCS as a locomotive engineer.

On the evening of June 17, 1991, in addition to his ordinary duties as a locomotive engineer, Daniels was also assigned the duty of serving as an engineer/trainer. This was not a voluntary arrangement. It was a part of his assigned duties. Daniels was to instruct a co-worker, Bennie Petry, in the operation of a locomotive engine. This meant that Daniels was to supervise the trainee, tell

him what to do, and try to keep him out of trouble. Mr. Daniels received no guidance from KCS regarding the manner in which he was to instruct his co-worker, and he was not sent to any classes to learn how to be an instructor. He did not receive any handouts or other literature to be used when serving as a trainer, and he did not receive any manuals guiding him in the training process.

KCS's entire training program was set forth in a three-page document. All new trainees began the program with a one-day orientation indoctrination class where the student was given operating manuals on various types of locomotives along with track charts and other materials that the student would use during the course of the training. After the eight-hour orientation class, the student began his on-the-job training operating locomotives with current engineers. The training program was such that a trainee might end up operating a different model of locomotive on each of his first several days of training.

It was not until sixty to ninety days *after* the training program started that the trainee took part in any classroom instruction. During this sixty-to-ninety-day period, the railroad did not take any steps to make sure trainees were reading the materials given to them during the orientation class. Trainees did not take any written examination regarding the reading material until the classroom instruction commenced sixty to ninety days after the beginning of the training program. The trainees were randomly assigned to engineer/instructors and might have a different instructor each day.

Other than information he could glean from Mr. Petry, Mr. Daniels did not know what experience Mr. Petry already had in operating locomotives.

The railroad's only instruction to Mr. Daniels was to let Mr. Petry operate the locomotive. On the date of Petitioner's accident, Mr. Petry was on his tenth day of on-the-job training. KCS's records revealed that Mr. Petry was only present for two and one-half hours of the eight-hour initial orientation session. Mr. Petry was not instructed to read any of the materials given to him during the orientation class.

Mr. Daniels, Mr. Petry, and a brakeman, Mr. Doty, were taken by automobile to the diesel shop to pick up the locomotive engine on No. 2 track on the day of the accident. To comply with the railroad's instructions, Mr. Daniels allowed Mr. Petry to sit in the engineer's seat and operate the locomotive. At that time, Mr. Daniels and Mr. Petry were the only two individuals in the cab of the locomotive. Brakeman Doty was at the rear of the second locomotive unit being pulled by Mr. Daniels and Mr. Petry. Mr. Daniels chose to sit in a seat immediately to the left of Mr. Petry so that he could be certain Mr. Petry heard any commands he was giving. Mr. Daniels and Mr. Petry were supposed to take the locomotives from the diesel shop and connect them to a train located on the west line. Mr. Petry started too fast and Mr. Daniels told him to slow down. He also instructed Mr. Petry to obey the signals given to him by Brakeman Doty. Daniels advised Mr. Petry on several occasions to "take it easy" and told Mr. Petry to keep his speed slow.

Mr. Petry followed all of Mr. Daniel's instructions. While attempting to do a coupling maneuver, and while

Mr. Daniels was bending down to adjust the lid on a cooler, Mr. Petry suddenly moved the locomotive throttle to the maximum point. Mr. Daniels had no warning that Mr. Petry was going to open the throttle all the way and, in fact, immediately before adjusting the cooler lid, Mr. Daniels checked the locomotive's speed and instructed Mr. Petry to slow down. It was only after Mr. Petry complied with his instruction that Mr. Daniels took the time to adjust the cooler lid. In the two to three seconds it took Mr. Daniels to adjust the cooler lid, he heard the locomotive engine rev up, and then he was knocked unconscious. Without warning, Mr. Petry had accidentally moved the throttle to its maximum position when instead he should have applied the brake. Mr. Daniels thereafter brought a FELA action against the railroad for his injuries.

The case was submitted to a jury in Jackson County, Missouri, and at the close of all evidence, the jury returned a verdict for the Petitioner, Mr. Daniels, in an amount of $463.501. KCS filed a Motion for Judgment Notwithstanding the Verdict, which was sustained by the trial judge by an order of August 29, 1995. (App. at A-9.)

On the appeal to the Missouri Court of Appeals, Western District, the appeals court upheld the trial court's order granting the motion for JNOV and, in an unpublished opinion (App. at A-1) issued October 22, 1996, ruled, in essence, that Mr. Daniels could be barred from recovery under FELA even though his own negligence, if any (in momentarily being distracted by the cooler), was not the sole proximate cause of his injury. (App. at A-4 to A-5.) Moreover, the appeals court concluded that Mr. Daniels, as an engineer instructor charged with the responsibility to supervise and instruct

Mr. Petry, would be considered, as a matter of law, an insurer of his own safety. (App. at A-5.)

In an order without an opinion, the Missouri Supreme Court allowed the appeals court decision to stand by denying the Petitioner's (Mr. Daniels's) Application to transfer to the Missouri Supreme Court. The Missouri Supreme Court's order was entered of record on January 21, 1997, and this Petition for Writ of Certiorari followed.

REASONS FOR GRANTING WRIT

The Missouri Court of Appeals and the Missouri Supreme Court, by acquiescence in the opinion, have violated clear standards and ignored controlling United States Supreme Court precedent. The Missouri courts have applied a new and unique standard to deny a railroad worker's recovery by carving out a perverse exception to the Federal Employer's Liability Act, a standard which violates the worker's right to a jury trial. This novel and very dangerous precedent threatens the basic rights granted by the FELA. This decision, involving an important federal question, is in direct conflict with the decisions of the Eighth Circuit Court of Appeals and relevant decisions of the United States Supreme Court.

In an opinion totally skewing existing law, the Missouri Court of Appeals for the Western District has ruled that a railroad worker may be held to be an "insurer" of his own safety and thereby barred from recovery, even if his own negligence was not the "sole cause" of his injuries. This ruling establishes a novel and highly erroneous legal principle which creates a new class of

railroad worker whose employer is immune from claims arising from his injury because his status, under the railroad's rules, makes the employee an "insurer"of his own safety. Even though comparative negligence, which requires the worker to exercise ordinary care for his own safety, is clearly the standard to be applied under the FELA, this decision has created a pernicious new rationale for the judicial denial of a jury trial and now threatens this basic statutory guarantee. The principles of comparative negligence would not have barred recovery since the worker's negligence was trivial at most. The Missouri Supreme Court has assented, without protest, to the Appellate Court's grossly inappropriate transmutation of the federal law by failing to grant the injured worker's application for transfer to the state Supreme Court.

The State Court's opinion in this matter is so clearly in conflict with the opinions of this Court that it will cause confusion, conflict and gross misapplication of the law in the state courts of Missouri and elsewhere when those courts attempt to apply the statutory elements of the FELA. This honorable Court must, therefore, grant the Writ of Certiorari.

I

This Court has not hesitated to grant certiorari in cases where clarification is required concerning the scope and coverage of the Federal Employers' Liability Act in the protection of injured railroad workers. *See Norfolk & Western Railway v. Hiles*, 116 S. Ct. 890 (1996) (reviewing Illinois Appellate Court decision as to whether railroad was liable as a matter of law under the Safety

Appliance Act and FELA for injuries incurred by railroad worker while trying to straighten misaligned drawbar); *Consolidated Rail Corp. v. Gottshall*, 114 S. Ct. 2396 (1994) (reviewing decision of the Third Circuit Court of Appeals in case arising out of Pennsylvania, to decide the proper standard for evaluating claims for negligent infliction of emotional distress brought under FELA); *St. Louis Southwestern Railway v. Dickerson*, 470 U.S. 409, 411 (1985) (reversing a Missouri Court of Appeals ruling, and holding that, in a FELA case in Missouri courts, the question of whether an instruction requiring a jury to base a damage award on its present value was appropriate was a federal question, to be decided based on federal, not state, law; in FELA cases, the award should be based on its present value); *Rogers v. Missouri Pacific Railroad*, 352 U.S. 500 (1957) (reviewing decision by the Missouri Supreme Court and holding that the state supreme court had invaded the province of the jury in a FELA case when it ruled, as a matter of law, that the injured worker's own conduct had been the sole cause of his mishap). Likewise, in the instant case, this Court should grant the Writ of Certiorari to effectuate the intent of Congress to secure the railroad worker's right to a jury determination as to fault on the part of the defendant railroad and fault on the part of the plaintiff employee. As has been stated by this Court in *Rogers v. Missouri Pacific Railroad*, "this Court is vigilant to exercise its power of review in any case where it appears that the litigants have been improperly deprived of that determination." 352 U.S. at 509; *see also Lavender v. Kern*, 327 U.S. 645, 652-53 (1946) (another case arising out of the Missouri courts, wherein the Supreme Court ruled that the Missouri Supreme Court unduly invaded the province of the jury where the state supreme court concluded that the jury verdict in favor of the plaintiff—who may or may not have been hit in the head

by a mail hook protruding from a train—involved speculation and conjecture; it was *not* a function for the appellate courts to weigh the conflicting evidence, judge the credibility of the witnesses, and arrive at a conclusion opposite from the one reached by the jury).

This Court must be vigilant in this instance. It must correct the blatant errors committed by the Missouri Court of Appeals in interpreting and applying the federal Act, and it must once again instruct the Missouri courts on the correct application of FELA and the teachings of the United States Supreme Court—teachings that the Missouri courts, some forty to fifty years after *Lavender* and *Rogers*, have arrogantly ignored.

II

First, the Missouri Court of Appeals either applied the wrong standard for comparative negligence under FELA, or it erroneously ruled, as a matter of law, that the plaintiff in this matter was "solely" responsible for his own injuries because he was, in essence, an insurer of his own safety. The appeals court opinion is hopelessly unclear as to its rationale for its result, but under either reading of the opinion, it is clear that the Missouri court failed to apply FELA correctly in this instance and completely ignored controlling United States Supreme Court precedent. In stating the negligence duties owed by the railroad and the injured employee, the Missouri court stated:

> A railroad is liable for injuries arising in whole or in part from the negligence of its employees. F.E.L.A., 45 U.S.C. § 51. No recovery is permitted, however, where

> the negligence causing injury is that of the employee making the claim. Barnett v. Terminal R.R. Ass'n, 228 F.2d 756, 761 (8th Cir. 1956), cert. denied, 351 U.S. 953 (1956). The evidence at trial revealed that Mr. Daniels was responsible for the movement of the train and that he was inattentive to the train's movement. His negligence in performing his duties resulted in his injury.

Daniels v. Kansas City Southern Railway, Appeal No. 51609, slip op. at 4 (Mo. Ct. App. 1996). Obviously, this is a misstatement of the law. Neither the Eighth Circuit's opinion in the *Barnett* case, cited by the appeals court, nor the precedents from this Court have ever suggested that some negligence on the part of the injured employee is sufficient to bar his claim. On the contrary, it is well established that, under FELA, the contributory negligence of the injured employee is not a bar to recovery "unless it is the *sole* cause of the injury or death." *New York Central Railroad v. Marcone*, 281 U.S. 345, 350 (1930) (emphasis added); *Barnett v. Terminal Railroad Association of St. Louis*, 228 F.2d 756, 761 (8th Cir.), *cert. denied*, 351 U.S. 953 (1956) (the court stating the correct rule that "where the negligence is that of the employee *alone* there can be no recovery," and approving an instruction which stated that "if the jury found that the plaintiff was guilty of negligence and 'that his negligence was the *sole proximate cause* of the accident and his injuries' the verdict should be for the defendant") (emphasis added).

Stated another way, a FELA case must be decided by the jury if the proofs, within reason, justify the conclusion that employer (railroad) negligence "played

any part, even the slightest, in producing the injury or death for which the damages are sought." *Rogers v. Missouri Pacific Railroad*, 352 U.S. at 506; *see also Sinkler v. Missouri Pacific Railroad*, 356 U.S. 318, 330 (1958) ("[A] railroad worker may recover from his employer for an injury caused in whole or in part by a fellow worker, not because the employer is himself to blame, but because justice demands that one who gives his labor to the furtherance of the enterprise should be assured that all combining their exertions with him in the common pursuit will conduct themselves in all respects with sufficient care that his safety while doing his part will not be endangered").

In the present case, as even a cursory examination of the record reveals, there was ample evidence of negligence on the part of the railroad through the actions of the engineer-trainee who was operating the engine at the time of the accident, and through the actions or inactions on the part of the railroad in failing to institute and carry out a reasonably safe engineer training program. As was pointed out by the Missouri Court of Appeals, the plaintiff, Mr. Daniels, was riding in the locomotive and supervising and instructing Mr. Petry, the trainee and fellow employee who was operating the locomotive at the time of the accident. (Slip op. at 2.) Negligence on the part of the fellow employee, Mr. Petry, is clear and beyond question. While Petry was attempting to carry out a coupling procedure, he (the trainee) allowed the speed of the locomotive to increase, despite the fact that Mr. Daniels had instructed him to slow down on more than one occasion. (Slip op. at 2.) The brakeman signaled for Petry to abort the coupling procedure. Instead of applying the brake, however, Petry negligently moved the throttle to maximum speed, causing the locomotive to forcefully

strike the parked coal car, thereby causing the plaintiff's injuries. (Slip op. at 3.) Clearly, there was negligence on the part of Petry, the plaintiff's co-worker and fellow employee of the railroad, as reflected by the jury's verdict in favor of the plaintiff and against the railroad. Nevertheless, the trial court sustained the railroad's motion for JNOV, and the appeals court affirmed that ruling in the face of clear evidence that (1) the plaintiff's co-worker was negligent, (2) such negligence was a proximate cause of the plaintiff's injuries, and (3) the plaintiff's negligence, if any, in being distracted momentarily from supervising the trainee, was not the "sole proximate cause" of his own injuries.

Although the appeals court's opinion is less than clear as to its rationale, it appears that the ruling is based on the conclusion that, as a matter of law, the railroad could not have been negligent either through the acts of the engineer-trainee or through the railroad's failure to use reasonable care in formulating and implementing its engineer training program. As a matter of logic, the opinion seems to suggest that if no negligence can be attributed to the co-worker or to the railroad, then the sole negligence proximately causing his injuries must lie with the plaintiff, Mr. Daniels. The fundamental flaw in the appeals court's approach to the case, however, is in its conclusion that, as a matter of law, no negligence can be attributed to the co-worker, Petry, or to the railroad. The jury, of course, on proper instructions, concluded that such negligence which proximately caused the injuries could be attributed to the fellow employee or the railroad.

Obviously, Petry was negligent in failing to slow down and, in fact, in accidentally speeding up during the coupling procedure. The appeals court reasoned, however,

that the engineer-instructor, Mr. Daniels, was solely responsible for his own injuries because he was supervising and instructing Petry at the time of the accident, the court stating:

> The Addendum to the Union agreement between the Brotherhood of Locomotive Engineers and KCS states that although the engineer-instructor is not responsible for damage resulting from rough handling of the train while being operated by the trainee, the agreement does not absolve the engineer-instructor of all responsibility. The engineer-instructor is responsible for the performance of his duties as an engineer-instructor, including the safe movement of his train and engine. Instead of observing Mr. Petry from a place where he could direct the train's movement and take corrective action if necessary, Mr. Daniels sat bent over in the middle of the cab adjusting the lid of a cooler.
>
> The operating rules of KCS provide that Mr. Daniels' *duty as an engineer-instructor was to ensure* the safe operation of the engine. . . .
>
> Mr. Daniels' duty included supervising Mr. Petry's coupling of the railroad cars. *Mr. Daniels was obligated to ensure* that he was in a position during this critical maneuver to exercise control should the situation require it. . . . His negligent inattention to duty caused his own injury.

> He cannot recover from KCS because of his negligent performance of his duties.

(Slip op. at 4-5 (emphasis added).)

Despite the appeals court's suggestion otherwise, it is clear that the agreement between the union and the railroad or the operating instructions of the railroad cannot obviate the plain text of FELA or override the rulings of this Court to make a railroad engineer an insurer of his own safety when he supervises a trainee during the course of carrying out his duties for the railroad. It might be true that, as to third persons or concerning damage to railroad property, the union agreement and the operating rules of the railroad may be interpreted to place ultimate responsibility for the safe operation of the locomotive on the engineer-instructor. But nothing under FELA or the decisions of the Supreme Court even remotely suggests that the engineer-instructor is held to be an insurer of his own safety in such circumstances.

Indeed, to interpret the agreement or operating instructions as requiring that the engineer-instructor bear all responsibility for his own injuries while instructing or supervising a trainee would run counter to the provisions of 45 U.S.C. § 55, which specifically provides:

> Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void[.]

The effect of a purported contract provision or operating regulation which would make the engineer-instructor an insurer for his own injuries in any accident in which he was engaged in supervising a trainee would be to exempt the railroad from liability otherwise created by FELA, in direct contravention of § 55 of the Act, and such a contract or regulation would be void. *See Boyd v. Grand Trunk Western Railroad*, 338 U.S. 263, 265-66 (1949) (provision of FELA prohibiting any contract, regulation, or device to enable a carrier to exempt itself from any liability created by the Act is entitled to the full effect that its comprehensive phraseology implies); *cf. Atchison, Topeka & Santa Fe Railway v. Buell*, 480 U.S. 557, 567 (1987) (railroad worker alleged that harassment by fellow workers led to his emotional breakdown; fact that the alleged injury was caused by conduct that may have been subject to arbitration under railroad's collective bargaining agreement did not deprive employee of his right to bring a FELA action for damages; FELA not only provides substantive protection against conduct that is independent of the employer's obligations under its collective bargaining agreement, but also affords injured workers a remedy suited to their needs).

The remedy for the injured employee in the present case is clear. He is entitled to bring an action for negligence against the railroad and have that negligence determined by a jury. It is only when the employee's own contributory negligence is the "sole" cause of his injuries that he will be prevented from pursuing that remedy. *See New York Central Railroad v. Marcone*, 281 U.S. at 350. And it is likewise clear that the contributory negligence which might bar or reduce the worker's claim is based on the worker's duty to use reasonable, ordinary care for his own safety under all the circumstances—it is not based on

any notion that, under some circumstances, the worker may be held to be an insurer for his own safety. Both the United States Supreme Court and the state courts of Missouri have held that, in applying the contributory negligence duty in a FELA case, the injured worker will be found to have been contributorily negligent if he failed to use those precautions for his own safety which "ordinary prudence" requires. *Schlemmer v. Buffalo, Rochester & Pittsburgh Railway*, 220 U.S. 590, 596 (1911) ("Contributory negligence . . . is the omission of the employee to use those precautions for his own safety which ordinary prudence requires"; employee of railroad has "duty of using ordinary care for his own protection under the circumstances as they existed"); *White v. St. Louis-San Francisco Railway*, 539 S.W.2d 565, 570 (Mo. Ct. App. 1976).

In the *White* case, for example, the Missouri Court of Appeals stated the rule with regard to the contributory negligence of an employee under FELA as follows:

> An employee is contributorily negligent when he fails to use those precautions for his own safety, which ordinary prudence requires. *Schlemmer v. Buffalo, Rochester and Pittsburgh Ry. Co.*, 220 U.S. 590, 596, 31 S.Ct. 561, 55 L.Ed. 596 (1911) and *Murray v. New York, New Haven & Hartford RR Co.*, 255 F.2d 42, 44 (2d Cir. 1958). The same standards as to proof and causation apply to both FELA plaintiffs and defendants. Plaintiff has the burden of proof in his cause, while the defendant has the burden of proof on plaintiff's contributory negligence. As to causation,

> plaintiff makes a jury case if his proof justifies, with reason, the conclusion that employer negligence played any part, even the slightest, in producing his injury. 45 U.S.C.A. § 51; *Rogers v. Missouri Pacific RR Co.*, supra.

539 S.W.2d at 570. Thus, in the instant case, by concluding that the engineer-instructor would be considered an insurer of his own safety, the court of appeals ignored not only the plain teachings of the United States Supreme Court, but its own state precedent.

To the extent the court of appeals' opinion in the instant case can be read as ruling that, as a matter of law, the engineer-instructor was "solely" responsible for his own injuries, such a ruling flies in the face of the clear facts of the case and in the face of controlling authority such as *Rogers v. Missouri Pacific Railroad*, which reversed a ruling by the Missouri Supreme Court that the plaintiff's conduct had been the sole cause of his accident as a matter of law. In reversing the Missouri court in that instance, this Court ruled that the case had been properly submitted to and decided by a jury, stating:

> Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence.

> Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death.
> . . .
>
> The law was enacted because the Congress was dissatisfied with the common-law duty of the master to his servant. The statute supplants that duty with the far more drastic duty of paying damages for injury or death at work due in whole or in part to the employer's negligence. The employer is stripped of his common-law defenses and for practical purposes the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit.

352 U.S. at 506-08 (footnotes omitted).

Likewise, the present case was properly submitted to the jury for determination both as to the railroad's negligence and the injured employee's contributory negligence. It was clear error under the holding of *Rogers* for the trial court and then the appeals court to negate that jury determination by granting the defendant's motion for JNOV.

III

The appeals court further ignored clear Supreme Court precedent by ruling, as a matter of law, that the plaintiff had not established negligence on the part of the railroad in instituting and implementing an inadequate engineer training program—a program that the plaintiff and Mr. Petry were participating in on the day of the subject accident. In essence, the appeals court ruled that the plaintiff had not established any reasonable foreseeability of harm from the inadequate training program in that "Mr. Daniels did not establish that KCS had any knowledge of problems with its training program or that it had even received complaints about the program." (Slip op. at 6.) Thus, the court suggests that the jury could not have reasonably concluded that the training program was dangerously inadequate because there was no evidence that the railroad had any actual knowledge of complaints or previous problems with the training program.

Clearly, under FELA, actual knowledge concerning a dangerous condition (in this case, the dangerous training program) is not necessary to establish negligence liability on the part of the railroad. The test for negligence and foreseeability under FELA is whether the defendant railroad knew or, by the exercise of due care, reasonably should have known that the training program was unreasonably dangerous. *See Urie v. Thompson*, 337 U.S. 163, 178 (1949) ("[N]egligence, within the meaning of the Federal Employer's Liability Act, attached if respondent 'knew, or in the exercise of due care should have known,' that prevalent standards of conduct were inadequate to protect petitioner and similarly situated employees"); *see*

also Hertzler v. Burlington Northern Railroad, 720 S.W.2d 762, 766 (Mo. Ct. App. 1986).

Even the Supreme Court case cited by the appeals court for the proposition that reasonable foreseeability is an essential element of the plaintiff's case, *Gallick v. Baltimore & Ohio Railroad*, 372 U.S. 108, 118 (1963), supports the plaintiff's position in the present case—that the appeals court's concept of foreseeability is too narrow for purposes of FELA and is in contravention of clear Supreme Court authority. In the *Gallick* case, this Court ruled that the Ohio Court of Appeals had erred in a FELA case when it demanded either direct evidence or more substantial circumstantial evidence that conditions on the railroad property furnished an environment for insects and infection which injured a worker on the property. The Supreme Court concluded there was sufficient evidence to submit the case to the jury, including the issue of foreseeability of harm. This Court concluded that the defendant's and the Ohio court's application of the foreseeability element of the prima facie case of negligence was too narrow under FELA, the Court stating:

> [I]n deciding whether respondent had reason to anticipate and foresee any harm to petitioner, the trial court instructed the jury to take into account "the past experience respecting the location and conditions in question" and the fact "that no occurrence of the kind here alleged either occurred, or was known by defendant to have occurred, at or near this place before August of 1954." The jury thus might have determined that, since there had been no similar incidents at this pool in the past, the respondent had no

> specific "reason" for anticipating a mishap or injury to petitioner—a far too narrow a concept of foreseeable harm to negative negligence under the Federal Employers' Liability Act.

Id. at 121 (footnote omitted). Likewise, the Missouri case relied upon by the state court of appeals does not support the decision in the instant case that some sort of actual knowledge of previous complaints or mishaps associated with the training program was required before a trier of fact could conclude that the program was dangerously inadequate and contributed in part to the injuries suffered by the plaintiff. *See Glover v. Atchison, Topeka & Santa Fe Railway*, 841 S.W.2d 211 (Mo. Ct. App. 1992). In the *Glover* case, the decision did not even turn on the issue of actual or constructive notice of hazards associated with the injury-causing incident in that case—a back injury caused by lifting. In *Glover*, the only evidence offered was that the plaintiff was lifting a metal slab and strained his back. There was no evidence concerning company rules or practices, training methods, or the like. And there was no evidence that the plaintiff was in an awkward or unusual position when he hurt his back. Basically, the only evidence was that he tried to lift the metal slab and hurt his back. On such evidence, the Missouri Court of Appeals simply concluded that "there is a lack of employer negligence, 'even in the slightest part' producing the plaintiff's injury, which was required for submissibility under FELA." *Id.* at 213.

Such sparse (indeed nonexistent) evidence was not the case in the present matter. There was ample evidence in the present case to support plaintiff's assertion that the engineer training program was negligently designed and

implemented by the railroad, and that the railroad should have known of such inadequacies. Some of that evidence is briefly summarized in the Plaintiff's Motion for Rehearing and Application for Transfer in the state court of appeals. (App. at A-12.)

IV

This appeal rests on a simple premise: A state court of appeals may not ignore controlling United States Supreme Court authority and the clear provisions of the Federal Employers' Liability Act in deciding that a negligence action against a railroad may be taken from the jury on a motion for judgment notwithstanding the verdict by ruling, in essence, that the injured employee was an "insurer" of his own safety and, therefore, as matter of law, was not entitled to bring a negligence action against the railroad. Furthermore, the state court may not ignore the plain text of the Act and the clear precedent of this Court by ruling that a FELA plaintiff may be barred from recovery by his own negligence even when that negligence was not the sole proximate cause of his injuries. Finally, the state court may not substitute its own judgment for that of the jury in deciding, as a matter of law, that the plaintiff's negligence, if any, was the sole proximate cause of his own injuries.

CONCLUSION

For all of the foregoing reasons, the Petitioner, Marvin Daniels, requests the Court to grant this Petition for a Writ of Certiorari to the Supreme Court of Missouri and accept this case for review.

Respectfully submitted,

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Attorney for the Petitioner

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1996

MARVIN DANIELS,

Petitioner,

v.

KANSAS CITY SOUTHERN
RAILWAY COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

APPENDIX

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DECISION OF THE MISSOURI COURT OF APPEALS, WESTERN DISTRICT

MISSOURI COURT OF APPEALS

WESTERN DISTRICT

MARVIN DANIELS,	)	
	)	
Appellant,	)	
	)	
vs.	)	WD 51609
	)	
KANSAS CITY SOUTHERN RAILWAY CO.,	)	Filed: October 22, 1996
	)	
	)	
Respondent.	)	

MEMORANDUM SUPPLEMENTING ORDER

AFFIRMING JUDGMENT PURSUANT TO

RULE 84.16(b)

This memorandum is for the information of the parties and sets forth the reasons for the order affirming the judgment.

THIS STATEMENT DOES NOT CONSTITUTE A FORMAL OPINION OF THIS COURT. IT IS NOT UNIFORMLY AVAILABLE. IT SHALL NOT BE REPORTED, CITED, OR OTHERWISE USED IN UNRELATED CASES BEFORE THIS COURT OR ANY OTHER COURT. IN THE EVENT OF THE FILING OF A MOTION TO REHEAR OR TRANSFER TO THE SUPREME COURT, A COPY OF THIS MEMORANDUM SHALL BE ATTACHED TO ANY SUCH MOTION.

Marvin Daniels appeals from the judgment notwithstanding the verdict (JNOV) in favor of Kansas City Southern Railway Company (KCS) in a personal injury action under the Federal Employers Liability Act (FELA). Mr. Daniels asserts that the trial court erred in granting the motion for JNOV because the evidence presented at trial established the railroad's negligence.

The judgment is affirmed.

Mr. Daniels was participating as an engineer-instructor in KCS engineer training program. The program provides training for new engineers. As a trainer, Mr. Daniels was to supervise the trainee and instruct him on how to operate a locomotive engine. Trainees are randomly assigned to trainers, and on the day of the accident Mr. Daniels was assigned to instruct B.R. Petry.

Mr. Daniels and Mr. Petry were to take a locomotive engine from the diesel storage shop and join it

to a coal train on the main line. The extent of participation by the student is at the discretion of the trainer. Mr. Petry asked if he could "do it all." Mr. Daniels allowed him to operate the locomotive. Prior to the accident, Mr. Petry had made two of three maneuvers necessary to complete the procedure. Both times Mr. Daniels instructed Mr. Petry to proceed more slowly. Mr. Petry decreased his speed after being instructed to do so.

During the third step of the coupling procedure, an accident occurred. While Mr. Daniels' attention was diverted to a cooler on the floor of the engine cab, Mr. Petry allowed the speed of the locomotive to increase. The brake-man signaled him to abort the coupling. Instead of applying the brake, Mr Petry moved the throttle to the maximum causing the locomotive to forcefully strike the parked coal train. The collision threw Mr. Daniels against the wall of the cab where he struck his head.

As a result of his injury, Mr. Daniels filed suit against KCS under FELA. The jury returned a verdict in his behalf for $463,501.50. The trial court sustained KCS's Judgment NOV motion which spawned this appeal.

The only issue on appeal is whether the trial court erred in entering the JNOV. This court views the evidence in the light most favorable to the verdict. *Glover v. Atchison, T., & S. F. Ry. Co.*, 841 S.W.2d 211, 212 (Mo. App. 1992). A JNOV is only proper if reasonable minds could not differ as to whether fault of the employer played any part in the employee's injury. *Id.* Under the Act, the right of the jury to determine the question of fault and causality must be liberally construed. *Chicago, R. I. & P. R.R. Co. v. Melcher*, 333 F.2d 996, (8th Cir. 1964).

In a FELA action, the railroad is liable if the evidence justifies with reason the conclusion that the employer's negligence played any part in producing the injury. *Lisek v. Norfolk & W. Ry. Co.*, 30 F.3d 823, 832 (7th Cir. 1994), *cert. denied*, 115 S.Ct. 904 (1995). If there is no evidence of the employer's negligence, JNOV is proper. *Id.* Mr. Daniels asserts two bases for KCS's negligence. First, Mr. Daniels claims that Mr. Petry, an employee of KCS, was negligent in his operation of the locomotive and second, that KCS was negligent in that its training program was insufficient.

A railroad is liable for injuries arising in whole or in part from the negligence of its employees. F.E.L.A., 45 U.S.C. § 51. No recovery is permitted, however, where the negligence causing injury is that of the employee making the claim. *Barnett v. Terminal R.R. Ass'n,* 228 F.2d 756, 761 (8th Cir. 1956), *cert. denied*, 351 U.S. 953 (1956). The evidence at trial revealed that Mr. Daniels was responsible for the movement of the train and that he was inattentive to the train's movement. His negligence in performing his duties resulted in his injury.

The Addendum to the Union agreement between the Brotherhood of Locomotive Engineers and KCS states that although the engineer-instructor is not responsible for damage resulting from rough handling of the train while being operated by the trainee, the agreement does not absolve the engineer-instructor of all responsibility. The engineer-instructor is responsible for the performance of his duties as an engineer-instructor, including the safe movement of his train and engine. Instead of observing Mr. Petry from a place where he could direct the train's movement and take corrective action if necessary, Mr.

Daniels sat bent over in the middle of the cab adjusting the lid of a cooler.

The operating rules of KCS provide that Mr. Daniels' duty as an engineer-instructor was to ensure the safe operation of the engine. Rule 533 permits the engineer-instructor to allow trainees to operate the engine and perform the function of an engineer, but the entire responsibility of the operation remains on the engineer. Mandatory review courses and tests covering the operating rules are conducted annually to ensure that employees know and understand the rules. Mr. Daniels testified that he was knowledgeable of the operating rules. Mr. Daniels knew the safe movement of the engine was his responsibility.

Mr. Daniels' duty included supervising Mr. Petry's coupling of the railroad cars. Mr. Daniels was obligated to ensure that he was in a position during this critical maneuver to exercise control should the situation require it. Rule 539 stresses that couplings are to be made with great care. During the most critical time of the engine movement, Mr. Daniels decided to adjust a cooler of blackberries and divert his attention from Mr. Petry, whom he knew had a tendency to speed, instead of controlling the situation and ensuring the safety of the engine. His negligent inattention to duty caused his own injury. He cannot recover from KCS because of his negligent performance of his duties.

Mr. Daniels' second assertion of negligence is that KCS's training program was neither well conceived nor well managed. The current training program has been used since the beginning of the railroad although modified and upgraded as necessary to keep current with changes in

locomotive engines. It was the same program under which Mr. Daniels trained to become an engineer and in which he had been an instructor 25-50 times. The program is "hands-on" training under the tutelage of a qualified engineer. The formalized training program currently used is a result of a collective bargaining agreement between the Brotherhood of Locomotive Engineers and KCS. This agreement requires the training of novices by locomotive engineer-instructors.

Reasonable foreseeability of harm is an essential ingredient of Federal Employers' Liability Act negligence. *Gallick v. Baltimore & O. R.R. Co.*, 372 U.S. 108, 118 (1963). The mere fact that an item or procedure could be better is not enough to establish negligence. *See Brady v. Southern R. Co.*, 320 U.S. 476, 484 (1943). Mr. Daniels did not establish that KCS had any knowledge of problems with its training program or that it had even received complaints about the program. When no showing is made of any reasonable foreseeability of harm, as in this case, the matter may be properly taken from the jury. *Glover v. Atchison, Topeka & Santa Fe Ry.*, 841 S.W.2d at 213.

The judgment is affirmed.

MISSOURI SUPREME COURT'S ORDER
DENYING APPLICATION FOR
TRANSFER

In the Supreme Court of Missouri

No. 79506
W.D. No. 51609

January Session, 1997

Marvin Daniels, Appellant,

vs. (TRANSFER)

Kansas City Southern Railway Co., Respondent.

Now at this day, on consideration of appellant's application to transfer the above-entitled cause from the Missouri Court of Appeals, Western District, it is ordered that the said application be, and the same is hereby denied.

Price, J., not participating.

STATE OF MISSOURI-Sct.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the January Session thereof, 1997, and on the 21st day of January, 1997, in the above-entitled cause.

Given under my hand and seal
of said Court, at the City
of Jefferson, this 21st day
of January, 1997.

/s/ Thomas F. Simon Clerk

_____ D.C.

TRIAL COURT'S ORDER SUSTAINING MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI
AT KANSAS CITY

MARVIN DANIELS,	)	
	)	
PLAINTIFF,	)	CASE NO: CV93-4398
	)	
vs.	)	
	)	CIVIL DOCKET 13P
THE KANSAS CITY	)	
SOUTHERN RAILWAY	)	
COMPANY,	)	
	)	
DEFENDANT.	)	

ORDER AND JUDGMENT

Present before the Court are defendant Kansas City Southern Railway Company's ("KCS") Motion and Suggestions for Judgment Notwithstanding the Verdict; Alternative/Supplemental Motion to Amend/Reduce Judgment; Alternative Motion for New Trial; and Alternative Motion for Evidentiary Hearing Regarding Juror Misconduct.

This Court heard the oral arguments of counsel on July 19, 1995, concerning the above motions filed by Kansas City Southern Railway Company. No post-trial motions were filed by Plaintiff. Plaintiff appeared by his attorney Charles Armbruster. Defendant appeared by its attorneys Thomas Stewart and Douglas Dalgleish.

The Court, after hearing oral argument and considering the written suggestions of Kansas City Southern Railway Company and no written suggestions of opposition being filed by Plaintiff, hereby enters the following Orders:

1. Kansas City Southern Railway Company's Motion for Judgment Notwithstanding the Verdict is SUSTAINED;

2. Kansas City Southern Railway Company's Alternative Motion for New Trial is OVERRULED, should entry of judgment notwithstanding the jury's verdict in favor of Kansas City Southern Railway be vacated or reversed;

3. Kansas City Southern Railway Company's Alternative/Supplemental Motion to Amend/Reduce Judgment is OVERRULED; and

4. Kansas City Southern Railway Company's Alternative Motion for Evidentiary Hearing Regarding Juror Misconduct is WITHDRAWN by defendant.

WHEREFORE, IT IS HEREBY ORDERED that judgment in favor of plaintiff Marvin Daniels, entered June 14, 1995, is hereby vacated, and judgment in favor of defendant The Kansas City Southern Railway Company is hereby entered against plaintiff. Costs are assessed against the plaintiff.

8-23-95 */s/ Jay A. Daugherty*
HONORABLE JAY A. DAUGHERTY
DIVISION 13

I hereby certify copies were mailed
on this date to the following:

Doug Dalgleish/Thomas Stewart
Charles Armbruster

cv\93-4398.7

MOTION FOR REHEARING AND ALTERNATIVE APPLICATION FOR TRANSFER (EXCERPT)

. . . .

3. The panel's opinion misstates, overlooks, and misinterprets the law governing a railroad's liability under the FELA. The railroad, under 45 U.S.C. § 51,

> Shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers agents or employees of such carrier . . . (emphasis added)

The Court acknowledges that B.R. Petry was an employee of KCS (opinion at 3) and states that:

> The brakeman signaled [Petry] to abort the coupling. Instead of applying the brake, Mr. Petry moved the throttle to the maximum causing the locomotive to forcefully strike the parked coal train. The collision threw Mr. Daniels against the wall of the cab where he struck his head.
> (opinion at 2, 3)

Under the FELA and under the standard of review applicable to a JNOV, the Court's review of the evidence should have ended there. In the above cited quotation, the Court set forth evidence supporting every element of a cause of action under the FELA. The Court was duly

bound to review the evidence in the light most favorable to Daniels, giving him the benefit of all reasonable inferences. Furthermore, the Court was obligated to disregard all evidence to the contrary. *Blake v. Irwin*, 913 S.W.2d 923, 928 (Mo.App.W.D. 1996); *Howard Construction Co. v. Teddy Woods, Construction Co.*, 817 S.W.2d 556, 560 (Mo.App.W.D. 1991). A jury verdict will not be overturned unless there is a complete absence of evidence to support it. *Id.* The panel's own words undeniably establish that the standard for upholding a JNOV could not be met in this case.

The panel's opinion goes far beyond the appropriate standard of review allowable in determining the propriety of a JNOV. In direct contravention of its legal duty to search the record for evidence to support the jury's verdict, the panel lifted its statement of facts entirely from KCS's brief. Instead of searching the record for favorable evidence, the panel ignored evidence supporting the verdict including:

a. On the day of the accident Daniels was informed he would have an engineer trainee working with him. (Tr. Vol. II, Pg. 264)

b. Pursuant to contract "The (engineer) instructor will permit the trainee to operate the engine and perform other functions." (Tr. Vol. II Pg. 266) (emphasis added).

c. The instructor will not be held responsible for broken knuckles, damaged drawbars or rough handling

when the engine is operated by the trainee. (Tr. Vol. II, Pg. 266) (emphasis added).

d. Daniels received no training to be an instructor. (Tr. Vol. II, Pg. 267)

e. Daniels was not provided with any manuals, classroom training or other materials to aid him in being an instructor. (Tr. Vol. II, Pg. 267)

f. Railroad workers must perform the jobs they are assigned to or risk being fired for insubordination. (Tr. Vol. III, Pg. 12)

g. Daniels sat in the middle seat on the engine so that Mr. Petry could hear his instructions but Appellant would not block Petry's view of the brakeman. (Tr. Vol. 2, Pg. 275).

h. Daniels monitored Petry's speed by observing the ground (Tr. Vol. II, Pg. 281, 285, 286)

i. B.R. Petry was sitting at the control stand and was the only person who had access to all the controls (Tr. Vol. II, Pg. 504, 505)

j. Daniels instructed B.R. Petry, among other things, to follow the

brakeman's signal (Tr. Vol. III, Pg. 280)

k. The brakeman gave the signal to abort the movement being made. (Tr. Vol. III, Pg. 517)

l. B.R. Petry did not abort the movement, but put the throttle in the maximum position instead of applying the brake. (Tr. Vol III, Pg. 518)

m. The engine collided with a parked coal train. (Tr. Vol. 2, Pg. 286-87)

n. Daniels was thrown against the cab wall and knocked unconscious. (Tr. Vol. II, Pg. 518)

o. B.R. Petry admitted that "If I would have been paying attention myself [the accident] wouldn't have never happened." (Tr. Vol. III, Pg. 520)

p. The safe movement of the engine is an equal responsibility of the conductor and the engineer. (Tr. Vol. III, Pg. 508)

Even though the panel set forth some evidence that favored the jury's verdict, it completely ignored such evidence in its analysis. Having found that Petry was an employee of KCS; that he was directed to abort the movement; that, instead of following the direction and

applying the brake, he throttled up; that moving the throttle to the maximum position caused the collision and; that the collision caused plaintiff to be thrown against the wall of the cab and strike his head, (opinion 3) the panel failed to address why such actions did not constitute negligence of a co-employee, thereby supporting the jury's verdict.

This opinion is a clear departure from well established case law in that it establishes a reduced standard of review for a JNOV. Alternatively, the opinion is an abberational opinion which could only result from misapprehension or misapplication of established law.

. . . .

5. The opinion further misstates and misapplies the law by stating "Mr. Daniels did not establish that KCS had any knowledge of problems with its training program or that it had even received complaints about the program. When no showing is made of any reasonable foreseeability of harm, as in this case, the matter may be properly taken from the jury." (opinion 6) The court completely ignored that notice can be either actual or constructive. The court has converted the law governing FELA cases into a standard requiring a plaintiff to prove that a railroad has actual notice of an unsafe practice. Heretofore, a plaintiff has only been required to show that the railroad knew or by exercise of due care, should have known of the unsafe condition. *Urie v. Thompson*, 69 S.Ct. 1018 (1949); *Hertzler v. Burlington Northern Railroad, Co.*, 720 S.W.2d 762, 766 (Mo. App. 1986). The assertion that KCS had no knowledge of problems with the training program, and had received no complaints about the program, begs the question. The question is whether KCS

should have known the program was not reasonably safe. The evidence on this issue included the following:

a. The engineer/instructor is given no guidance in the proper training of a new trainee. (Tr. Vol. 3, Pgs. 403-03).

b. KCS does not document the progress of trainees so that trainers can better understand the strengths and weaknesses of the individual trainees. (Tr. Vol. Pg. 497).

c. KCS makes no effort to be certain that all trainers know of all of the rules pertaining to the training program. (Tr. Vol. 3, Pg. 502) and provides no guidance or training to engineer/instructors (Tr. Vol. 2, Pg. 267).

d. Trainees receive no classroom training prior to operating locomotives other than the eight-hour orientation class in which they are taught how to fill out paperwork. (Tr. Vol. 3, Pgs. 388-89). B.R. Petry was only present for two and one half hours of that class. (Tr. Vol. 3, Pg. 493).

e. Trainees are not instructed as to what documents to review before

operating certain locomotives. (Tr. Vol. 3, Pg. 396).

f. Trainees are not told what model locomotive they will be operating on any given day so as to allow the trainee to review the materials pertaining to that locomotive before reporting to work. (Tr. Vol. 3, Pg. 397).

g. Trainees may operate a different locomotive on each day they report for their training program. (Tr. Vol. 3, Pg. 397).

h. Trainees do not receive any classroom instruction regarding the operation of a locomotive until 60-90 days after the training program begins and after the trainee has operated locomotives over the road. (Tr. Vol. 3, pg. 397-98).

i. Nothing is done to be certain that trainees are reviewing the written material given to them during the first day orientation class. (Tr. Vol. 3, Pg. 398.)

j. B.R. Petry (KCS's employee) admittedly acted in a negligent manner so as to cause Daniels' injury (Tr. Vol. 111, Pg. 520)

This evidence clearly supports the jury's findings that the training program was poorly conceived and designed, and the railroad should have realized the same. Furthermore, whether KCS should have anticipated the danger under a given set of circumstances is left to the jury to decide. *Hughes v. Terminal R.R. Assoc. of St. Louis*, 265 S.W.2d 273, 280-81 (Mo. banc. 154). It is improper for the reviewing court to reject the jury's finding. *Tennant v. Peoria & P.U. Railway Co.*, 64 S.Ct. 409, 412 (1944).

The panel's opinion completely ignored this testimony and, rather than disregarding contrary evidence from KCS (as required by law), the panel adopted KCS's evidence and viewed it in the light most favorable to affirming the JNOV.

6. Further, the panel's opinion misstates, overlooks, and misinterprets the law in stating: "the operating rules of KCS provide that Mr. Daniels' duty as an engineer instructor was to ensure the safe operation of the engine." (opinion at 4). And "Mr. Daniels was obligated to ensure that he was in position during this critical maneuver to exercise control for the situation required." (opinion at 5). The panel's opinion, therefore, holds that a railroad may delegate its nondelegable duty to provide employees with a reasonably safe workplace to its employees. The Court further holds that the employee's duty is greater than that of the railroad by making an engineer the insurer of the safety of a train's movement.

The panel's opinion establishes totally improper precedent in that, under this opinion, a railroad engineer could never recover under the FELA for accidents involving the operation of an engine. The engineer's duty,

by this opinion, has been converted from one of reasonable care on behalf of the engineer to one of an insurer for others' safety. This holding is contrary to case law and MAI instructions.

. . . .

45 U.S.C. § 51

§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or

closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

45 U.S.C. § 53

§ 53. Contributory negligence; diminution of damages

In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

45 U.S.C. § 55

§ 55. Contract, rule, regulation, or device exempting from liability; set-off

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

Supreme Court, U.S.
FILED
MAY 15 1997
OFFICE OF THE CLERK

No. 96-1662

In The

Supreme Court of the United States

October Term, 1996

MARVIN DANIELS,

Petitioner,

v.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The Missouri Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Federal Employers' Liability Act, may an injured worker be held to be an "insurer" of his own safety and thereby be completely barred from recovery even though his negligence was not the sole cause of his injuries?

LIST OF PARTIES

The parties to the proceeding in the Circuit Court of Jackson County, Missouri at Kansas City were the petitioner, Marvin Daniels, and the respondent, The Kansas City Southern Railway Company.

Pursuant to Supreme Court Rule 29.1, The Kansas City Southern Railway Company states that its parent company is Kansas City Southern Industries, Inc. ("KCSI"). KCSI also owns (either wholly or partially) the following subsidiary companies: Southern Group, Inc., Carland, Inc., Southern Capital Corporation LLC, Gateway Western Railway Company, Janus Capital Corporation, Berger Associates, Inc., Wyandotte Garage Corporation, Trans-Serve, Inc., Pabtex, Inc., DST Systems, Inc., Mexrail, Inc., and Transportacion Ferroviaria Mexicana S. de R.L. de C.V.

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STATUTES

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STATEMENT OF THE CASE

After working for respondent KCS as a clerk for twenty-three years, petitioner Marvin Daniels decided to begin working as an over-the-road locomotive engineer. Accordingly, Daniels applied for, was accepted in and completed KCS' locomotive training program. For the next fourteen years, Daniels worked steadily as a KCS engineer.

In recent years, in order to train new engineers, Daniels' labor union, The Brotherhood of Locomotive Engineers ("BLE"), and KCS collaborated and implemented a comprehensive engineer training program. Students accepted into the program received three separate stages of training over six months. First, applicants met for a general orientation class in which the training program was discussed and comprehensive written materials, including operating manuals and track charts, were distributed. Trainees then worked for 60-90 days under the direct supervision of a fully qualified engineer (such as Daniels) to obtain "hands on" locomotive operating experience. Finally, trainees returned to the classroom for two weeks of additional intensive training, including use of a simulator. KCS was not free to alter the contents or sequence of the engineer training program because it was encompassed within the KCS-BLE collective bargaining agreement.

Pursuant to the collective bargaining agreement, KCS was required to utilize existing engineers, such as Daniels, as engineer-instructors. These engineers were regularly tested and required to be familiar with the training materials. At trial, Daniels repeatedly admitted he knew exactly what he needed to do to train student-engineers.

Existing engineers were never forced to work as instructors – they could decline, and many did so without penalty. Instead of declining that responsibility, however, Daniels actually sought out trainees because instructors were paid more for trips.

Daniels served as an instructor 25-50 times prior to June 17, 1991, and admitted he knew his responsibilities as an instructor, was well-trained therefor, accepted those responsibilities, knew he was required to be vigilant at all times with a trainee, and knew he needed to be in a position to take over control of the train at all times. The uncontroverted evidence at trial established that the collective bargaining agreement explicitly placed the responsibility for safety on the engineer-instructor:

> He [the engineer-instructor] will . . . be responsible for the safe movement of his train and engine.

Daniels conceded during trial that he, as the instructor – and not any student-engineer – bore sole responsibility for operation of the train and engines.

Daniels reported for work at 4:00 p.m. on June 17, 1991. Daniels was informed he would have student B. R. Petry with him that day. Although he always had the option to decline taking a student, Daniels accepted the responsibility (and extra pay).

Before applying for the engineer training program, Petry had worked as a brakeman for KCS for thirteen years, was considered a good worker, and was familiar with railroad practices. Daniels admitted he worked with Petry while Petry was a brakeman, and had no complaints. Petry had satisfactorily completed his entrance examination, received positive recommendations from his

supervisors, and a favorable review of his work history. Petry had successfully completed the introductory orientation program, then operated trains for nine days under the supervision of qualified engineer-instructors before this incident. Petry satisfactorily completed all prior runs – none of his other instructors voiced any problems, criticisms or complaints to KCS.

KCS' operating rules and the collective bargaining agreement mandated that the engineer-instructor must always be in a position to observe all operating movements of the student, to observe signals given by other workers on the ground, and to be in a position to stop, slow or take over control and operation of the train if necessary. Daniels confessed that as the instructor, he was obliged to maintain constant vigilance and control since, by definition, engineer-trainees lacked experience in train handling. Furthermore, as the instructor, Daniels was required to ensure Petry was familiar with the engine controls and their job that day. As the instructor, Daniels possessed discretion to determine whether, and how much, a given student would be allowed to operate the engines. On June 17, 1991, Daniels permitted Petry to commence the movements necessary to couple two engines to a parked coal train on the KCS main line.

To couple the two engines onto the front of the coal train, three distinct forward and reverse movements had to be made. First, the two engines had to move in reverse 2,400 feet past a crossover switch. During this first maneuver, Petry operated the locomotives satisfactorily, but allowed his speed to increase beyond the yard speed limit of 10 miles per hour to 16 miles per hour. During

this first movement, Daniels stood by Petry in the engineer control stand, was attentive, instructed Petry to reduce his speed. Petry immediately complied.

During the second maneuver, Petry was required to move the engines approximately 626 feet forward, then stop again. During that second maneuver, Petry started, stopped and operated the engines satisfactorily, but again allowed his speed to increase to 12 miles per hour. Once again, Daniels correctly instructed Petry to reduce his speed and Petry immediately complied.

The third and final coupling maneuver was the most critical aspect of the job. In order to couple the two engines onto the front of the parked coal train, the engines had to be moved in reverse 437 feet. Proper couplings are to be made at no more than four miles per hour. Proper approach speed during the coupling maneuver is crucial because the coupling is made "metal to metal," and the stationary coal train would not "budge" upon impact.

Although Daniels had been standing and observing Petry's train handling during the first two maneuvers (and knew Petry "was fast"), during the final, critical maneuver, Daniels sat down in a seat in the middle of the cab and faced the direction opposite the movement of the train. From that position, Daniels could see virtually nothing. Instead, during this most critical maneuver, Daniels sat with his head down "fiddling with his cooler of blackberries."

As Petry commenced the reverse coupling maneuver, the speed of the locomotive climbed to 12 miles per hour, three times the proper coupling speed. Daniels, however,

failed to monitor or control the speed of the train, gave no instructions to Petry, failed to order Petry to apply the brakes and slow the train down, and failed to take control and apply the brakes himself. In fact, Daniels admitted he was not monitoring speed at the time of the coupling. Because of the high speed of the engines and since he was facing the opposite direction of travel, fiddling with his blackberry cooler with his head down, upon impact, Daniels' head hit the wall of the engine cab causing Daniels to sustain a mild concussion.

Daniels admitted the engineer training program was necessary, admitted he knew his responsibilities as an instructor, and confessed he accepted his responsibility to control operation of the train at all times. Daniels' own evidence established that no complaints or requests for changes were ever received regarding the engineer training program. No evidence was offered to prove KCS received prior notice of any problems with, or complaints about, the engineer training program in general, or student Petry in particular. No evidence was offered of any prior injuries or accidents. Indeed, during discovery, Daniels admitted he had no notice evidence.

At the close of Daniels' case, and all the evidence, KCS moved for directed verdicts noting that Daniels' claims were not submissible under 80 years of United States Supreme Court precedent because he was injured as a result of his own breach of an independent duty. KCS additionally noted Daniels failed to produce prima facie evidence to support his verdict directing instruction. The trial court provisionally denied KCS' motions. After the return of the jury's verdict, KCS timely filed its Motion for Judgment Notwithstanding the Verdict. Daniels filed

no opposing suggestions. Following oral argument, the trial court sustained KCS' Motion for Judgment Notwithstanding the Verdict, and judgment was so entered.

ARGUMENT

Petitioner, in urging that a writ be granted, states that the "novel and very dangerous" opinions of the lower courts herein "violated clear standards and ignored controlling United States Supreme Court precedent." Petitioner does not cite to this precedent because, in point of fact, the previous decisions of this Court wholly support the reasoning of the lower courts.

For eight decades, this Court has declared that an FELA plaintiff cannot recover for injuries resulting from his own breach of an independent duty. Based upon those cases, KCS requested, and the trial court submitted, a complete affirmative defense instruction. Daniels has neither challenged the procedural nor substantive elements of that affirmative defense instruction in pursuing his appeal. In fact, Daniels adduced testimony within his own case supporting all elements of that instruction. Consequently, judgment notwithstanding the verdict was correctly entered as a matter of law.

Daniels repeatedly admitted he was solely in charge of the movement of the engines and trainee Petry at the time of the coupling maneuver. Moreover, Daniels confessed that instead of performing his duties, he was sitting down, looking the opposite direction, fiddling with his blackberry cooler. Daniels never looked at the engine speedometers, allowed the train to approach at a speed

three times too fast, and never pulled the emergency brake or told Petry to stop or slow down. Daniels repeatedly adduced testimony within his own case that he was ultimately responsible for the train's movements and any accidents, and that he violated a handful of KCS' operating and safety rules.

Daniels' post-accident FELA lawsuit was literally an attempt to sue himself. The trial court correctly nullified that effort and the lower courts, relying on the established precedents of this Court, have affirmed that decision. Judgment notwithstanding the jury's verdict was correctly entered for KCS for at least two independent and equally dispositive reasons.

- First, under a long line of United States Supreme Court precedent, Daniels' claims are barred as a matter of law because he bore an independent duty to control the engines (and trainee Petry), failed to do so, and was injured as a result.

- Second, it has long been established that a verdict cannot stand, and judgment notwithstanding the verdict must be entered, if there is a void of evidence to support any one element of the plaintiff's verdict director and the evidence elicited during Daniel's own case negated the "notice" element of his verdict director.

A. KCS Was Entitled To Judgment Notwithstanding The Verdict Because Under A Long Line Of United States Supreme Court Precedent, Daniels' Claims Were Barred As A Matter Of Law Because He Bore An Independent Duty To Control The Engines (And Trainee Petry), Failed To Do So, And Was Injured As A Result

The Federal Employers' Liability Act provides:

> Every common carrier by railroad . . . shall be liable in damages to any person suffering injury resulting in whole or in part *from the negligence of any of the officers, agents, or employees* of such carrier, or by the reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works. . . .

45 U.S.C. § 51 (1986) (*emphasis added*). The uncontroverted evidence at trial established that a KCS employee's negligence caused this accident; that KCS employee was Daniels. Because of the unique circumstances established by the uncontroverted evidence, namely, the fact that Daniels was in charge at the movement and operations of the engines, the trial court, pursuant to federal substantive law, properly entered a judgment in favor of KCS notwithstanding the verdict.

This Court has established law, starting with *Great Northern Ry. Co. v. Wiles*, 240 U.S. 444 (1916) and ensuing cases, that railroad employees may not recover under the FELA against their employer for injuries caused by their own neglect of some independent duty arising out of the employer-employee relationship. The line of cases construing this principle of law compelled the entry of a

judgment in KCS' favor. For instance, in *Wiles*, a rear brakeman on the back portion a parted (or split) freight train disregarded his duty to go back a short distance and give warning signals to approaching trains notwithstanding the railroad's safety rules which required the brakeman to protect the rear of the train. *Id.* at 446. Instead, the brakeman remained in the caboose, and was killed by an approaching passenger train that collided with the brakeman's train. *Id.* at 448.

On the ensuing appeal of the plaintiff's jury verdict, this Court noted that the railroad's safety rules imposed a duty on the rear brakeman to go down the track and make appropriate signals to any on-coming trains. *Id.* at 447. The Court, in reversing the lower court judgment, declared that to excuse the brakeman's neglect "in any way would cast immeasurable liability upon the railroads, and remove security from the lives of those who travel upon them." *Id.* at 448. The brakeman's estate argued that a jury was entitled to sort out the parties' respective negligence – the brakeman's negligence in not signaling the train and the railroad's negligence in causing the train to be split in the first instance. The Court dismissed such an argument, concluding, in light of the brakeman's conduct, that "[t]here [wa]s no justification for a comparison of negligence or the apportioning of their effect." *Id.*

Wiles is the basis for a long line of similar cases. For instance, in *Frese v. Chicago, Burlington & Quincy Railroad Co.*, 263 U.S. 1 (1923), the estate of a deceased engineer appealed a decision of the Missouri Supreme Court reversing the estate's earlier favorable jury verdict. The deceased engineer had been in charge of his train on the

date of his death. The train was stopped 200 feet from a crossing while another train was also stopped some 300 feet (in the opposite direction) from the same crossing. The view from both trains was obstructed intermittently. Neither train crew discovered the presence of the other train until after the two collided.

This Court, in affirming the outright reversal of the jury verdict, noted that an applicable Illinois statute imposed a duty on the deceased engineer to ascertain that the way was clear before entering a crossing. In so finding the engineer's failure to abide by this statute dispositive, the Court rejected an argument that the engineer's death could have been prevented if his subordinates had been on the lookout, with Justice Oliver Wendall Holmes writing:

> [I]t would be a perversion of the [Federal] Employers' Liability Act to hold that [the deceased engineer] could recover for an injury due to his failure to act as required, on the ground that possibly the injury might have been prevented if his subordinate had done more.

Id. at 3.

Similarly, in *Davis v. Kennedy*, 266 U.S. 147 (1924), the Court reversed a judgment for another engineer's estate. In *Davis*, two trains collided head-on on a portion of single line track. The deceased engineer had been given instructions, both company rules and specific information on the date of the accident, never to pass a designated point (where the single line track began) unless he knew, as a fact, that a particular other train (approaching from the opposite direction) had already passed. In spite of these instructions, the engineer ran his train beyond the

designated point before the other train had passed, and a head-on collision resulted, causing the engineer's death. Subsequently, an FELA jury verdict was returned for his estate.

On the appeal, the verdict was set aside as the Court rejected the estate's argument that other members of the crew, along with the deceased engineer, were likewise bound to look out for the approaching train. The Court, echoing *Frese*, observed:

> It seems to us a perversion of [the FELA] to allow [the estate] to recover for an injury directly due to [the engineer's] failure to act as required on the ground that possibly it might have been prevented if those in secondary relation to the movement had done more.

Id. at 148-49.

Likewise, in *Unadilla Valley Ry. Co v. Caldine*, 278 U.S. 139 (1928), the Court, with Justice Holmes again writing, again ruled that the railroad could not be held liable under the FELA where a deceased employee disobeyed printed company rules. In *Caldine*, a conductor on a train traveling on single line track had instructions to pull his train off on to a siding to allow another approaching train to pass. On the date of the accident, the conductor did not have his train come to a stop at the siding and a head-on collision ensued, resulting in the conductor's death. Once again, a jury returned a FELA verdict in favor of the employee's estate.

On the appeal that followed, the estate argued that there was considerable evidence relating to negligence of employees other than the deceased conductor:

- The approaching train was running behind schedule, but that information was never conveyed to the deceased conductor's train; and
- The crew on the train with the deceased conductor "should have refused to obey the conductor and should have conformed to the rule, and [their] act in physically starting the car was even more immediately connected (to the accident) than the order of the deceased."

Id. 140. Justice Holmes disagreed that other employees were negligent and a cause "in whole or in part" of the collision.

> [The conductor] was in command. He expected to be obeyed and he was obeyed as mechanically as if his pulling the bell had itself started the train. In our opinion he cannot be heard to say that his subordinate ought not to have done what he ordered. He cannot hold the [railroad] liable for a disaster that followed disobedience of a rule intended to prevent it, when the disobedience was brought about and intended to be brought about by his own acts.

Id. at 141-42.

The above cases take on even more significance because, in *Walker v. Lykes Brothers Co.*, 193 F.2d 772 (2d Cir. 1951), Judge Learned Hand cited such opinions for the proposition that one unique type of employee breach of duty creates *an absolute bar* to any recovery under the FELA and the Jones Act (the maritime equivalent of the FELA). In *Walker*, the master on a ship was injured after being struck by a steel filing cabinet. At the ensuing trial,

the master testified that the filing cabinet was improperly secured within the ship, allowing the drawers to come out unexpectedly. A jury verdict was returned for the master.

On appeal, the ship owner argued that, as master of the ship, plaintiff himself was charged with fulfilling the ship owner's non-delegable duty to provide a safe place to work. The master countered by arguing that such evidence merely went to the issue of "contributory negligence" that might reduce or diminish his recovery. The court of appeals disagreed:

> We shall therefore accept the traditional rubric and think of contributory negligence as the breach of a duty to the wrongdoer. The important thing in situations like that at bar is to distinguish between such a duty, which the law imposes upon the injured person, regardless of any conscious assumption of a duty towards the wrongdoer, and *a duty which the injured person has consciously assumed as a term of his employment*. By 'contributory negligence' which results in no more than reducing the amount of an employee's recovery, the [FELA and the Jones Act] means the first; *the second is a bar to recovery*.

Id. at 773 (*emphasis added*) (*citing Wiles, Frese, Davis* and *Caldine*). Thus, "a momentary inattention to one's own safety . . . should not be treated as so serious a fault as the breach of a duty assumed by the employee for the protection of others." *Id.* The court concluded that since plaintiff was master of the ship he was in no position to allege negligence by the ship owner for failing to provide safe working condition – conditions under his control and

supervision. *See also Reinhart v. United States*, 457 F.2d 151, 153-54 (9th Cir. 1972); *Schlichter v. Port Arthur Towing Co.*, 288 F.2d 801, 806-07 (5th Cir.), *cert. denied*, 368 U.S. 828 (1961); *Dixon v. United States*, 219 F.2d 10, 16 (2nd Cir. 1955).

As in *Wiles* and the cases that followed it, Daniels attempted to pervert the very meaning of the FELA. While KCS had a non-delegable duty to provide a safe place for its employees to work, as a corporation, it could discharge that duty only through its employees. In this case, it was Daniels himself, the individual in charge of the movement and speed of the engines, who was legally responsible for ensuring a safe place to work in that respect. Yet it is Daniels who now complains it was not a safe work place in that same respect. Essentially, Daniels has attempted to assert liability against KCS for his own failures. Daniels cannot hold KCS legally responsible for his own negligence and failure to perform an independent duty. Under the controlling federal substantive law, the trial court properly entered a judgment notwithstanding the jury's verdict.

The standard for granting a judgment notwithstanding the verdict motion in an FELA case is the same as that for granting directed verdicts in FELA cases. *Brady v. Southern Ry. Co.*, 320 U.S. 476, 479-80 (1943). With *Brady*, this Court warned that it would not be enough for plaintiffs like Daniels simply to produce evidence of an injury, cast speculations to the jury about other ways to do the job, then sit back to wait and see what happens:

> The weight of evidence under the Employers' Liability Act must be more than a scintilla

> before the case may be properly left to the discretion of the trier of fact – in this case the jury. . . . When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is safe from the mischance of speculation over legally unfounded claims.

Id. at 479-80.

B. KCS Was Entitled To Judgment Notwithstanding The Verdict Because There Is A Void Of Evidence To Support One Element Of The Plaintiff's Verdict Director And, In Fact, The Evidence Elicited During Daniel's Own Case Negated The "Notice" Element Of His Verdict Director

In an FELA case, the plaintiff always bears the burden to prove that: (1) a hazardous condition, unsafe work method, unsafe appliance or inadequate help existed, and (2) the railroad could have foreseen that the particular condition, work method, appliance or inadequate help could cause injury. *Nivens v. St. Louis Southwestern Ry. Co.*, 425 F.2d 114, 118 (5th Cir.), *cert. denied*, 400 U.S. 879 (1970). Foreseeability and notice thus are essential ingredients of liability under the FELA. *Id.*

Whether an injury was foreseeable is determined by "what should have been anticipated and not merely what has happened." *Taylor v. Missouri Pacific R.R. Co.*, 510

S.W.2d 735, 737 (Mo. App. 1974). Accordingly, it is elementary that under the FELA, the railroad must have actual or constructive notice of the danger presented by allegedly hazardous conditions, work methods, inadequate help or tools. *Gallick v. Baltimore & Ohio R.R. Co.*, 372 U.S. 108, 117 (1963). The railroad cannot be held liable if it had no reasonable way of knowing about the hazard which caused the employee's alleged injury. *Peyton v. St. Louis Southwestern Ry. Co.*, 962 F.2d 832, 833-34 (8th Cir. 1992). The occurrence of an accident or an injury alone does not connote notice, negligence or liability under the FELA. *Glover v. Atchison, Topeka & Santa Fe Ry. Co.*, 841 S.W.2d 211, 213 (Mo. App. 1992). In accordance with this law, the first paragraph of Daniels' verdict director required him to prove KCS had actual or constructive notice of the alleged flaws within its engineer training program. Such a burden was mandated by federal law. *Qualls v. St. Louis Southwestern Ry. Co.*, 799 S.W.2d 84 (Mo. 1990) (*en banc*), *cert. denied*, 499 U.S. 961 (1991).

Recognizing this important burden, Daniels attempted to elicit testimony that complaints were made to KCS about the training program prior to his accident. All such alleged evidence was properly excluded.[1] Accordingly, there is no evidence in this record of any notice to KCS about problems with the training program generally, or Petry in particular, either via prior complaints, criticisms, accidents, "close calls," demands for review of the training program, demands to renegotiate

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[1] Before trial, KCS sent discovery requests seeking any information Daniels possessed of prior complaints or notice. Daniels responded he had no such evidence.

the union contract, etc. In fact, the evidence within Daniels' own case was quite to the contrary.

Daniels' evidence established that KCS' program complied with the collective bargaining agreement and KCS' Operating Rules, KCS' program was essentially the same as that used by all other railroads; there had never been a complaint registered by the union (or anyone else) regarding the training program; and there were no prior accidents arising from the program. Daniels himself admitted neither he, nor anyone else he could identify, ever had a prior problem with trainee Petry, *i.e.*, there was no reason for KCS, or anyone else, to suspect this event would occur. Daniels' evidence, as a matter of law and common sense, fell short of the legal mark of raising a jury question as to notice.

CONCLUSION

Despite petitioner's attempt to characterize this case as a dramatic break in the long tradition of FELA law, a review of the underlying facts and reasoned lower court opinions reveals that this case is consistent with well-established FELA precedent emanating from this Court. Petitioner offers no compelling or substantial reason to have this Court reverse and discard this prior law except for the fact that he does not like the result this law mandates in his case. There are no special or important reasons for granting the petition and thus the Court should deny the petition.

Respectfully submitted,

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